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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: LIN 07 114 52362 Office: NEBRASKA SERVICE CENTER Date: MAR 10 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand for further investigation and consideration.

The petitioner provides information technology consulting services. It seeks to employ the beneficiary permanently in the United States as a senior software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S. C. § 1153(b)(2). As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a U.S. Master's Degree in Computer Science or a foreign equivalent degree.

On appeal, the petitioner submits evidence that, prior to certification, the DOL inquired into whether or not the beneficiary met the job qualifications and, upon considering the petitioner's response, approved the alien employment certification. For the reasons discussed below, the statute confers the jurisdiction to determine whether the alien qualifies for the job certified upon U.S. Citizenship and Immigration Services (USCIS), not DOL, a point recognized by several federal court decisions. Nevertheless, given the specific evidence of DOL's inquiry into this issue and their ultimate certification of the Form ETA 750 without amendments, we find that there are stronger grounds of ineligibility not raised by the director. Therefore, we will remand the matter to the director to address these issues.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB,* 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

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[1] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

The regulation at 8 C.F.R. § 204.5(k)(4) also provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.)

The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The priority date for the instant petition is April 19, 2004. On the Form ETA 750B, signed by the beneficiary on March 26, 2004, the beneficiary claims to have worked for the petitioner since June 2002.

The beneficiary possesses a foreign three-year bachelor's degree in Statistics from the University of Madras and a two-year Master's degree in Statistics from the same institution. The issue raised by the director is whether this education can serve to meet the job requirements certified by DOL.

As noted above, the ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith,* 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Mandany,* 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear tha the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d at 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)[(5)] of the . . .[Act]. . . is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)[(5)], 8 U.S.C. § 1182(a)(5). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a *de novo* determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu, 736 F.2d at 1309.

A *de novo* review by USCIS means that even where DOL does inquire into this issue, its conclusions do not bind USCIS.

The above decisions have been favorably referenced in more recent decisions. For example, after citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1008 and *Madany v. Smith,* 696 F.2d at 1012, the court in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 *5 (D. Ore. Nov. 30, 2006)

expressly and unambiguously rejected the argument that DOL certification precludes USCIS from considering whether the beneficiary meets the educational requirements specified in the labor certification. Similarly, the Seventh Circuit recently acknowledged:

> The court in *K.R.K. Irvine* pointed out that the responsibility of the Immigration and Naturalization Service in regard to employer-based immigration was (and the responsibility of its successor, the Department of Homeland Security, is) limited to "determining if the alien is qualified for the job." *K.R.K. Irvine, Inc. v. Landon, supra,* 699 F.2d at 1008, and *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra,* 736 F.2d at 1309, says it's "whether the alien is in fact qualified to fill the certified job offer." Those are different inquiries from whether the qualifications set by the employer are proper, which is the responsibility of the Labor Department.

Hoosier Care, Inc. v. Chertoff, 482 F.3d 987, 990-91 (7th Cir. 2007).

Given the above language, DOL cannot bind USCIS in a determination as to whether the alien qualifies for the certified position. Nevertheless, we recognize that DOL sets the job requirements and, given DOL's documented inquiry in this matter, we acknowledge that it could be argued that DOL interpreted the job requirements as permitting the beneficiary's statistics degree with computer coursework as a related field or that the beneficiary established an equivalency of a Master's degree in Computer Science derived from a combination of education and experience.[2] That said, DOL did not require any amendments to the Form ETA 750 and certified it as written. The requirements, reproduced below, are plain and unambiguous. Where the requirements are not ambiguous, USCIS need not inquire into the employer's intent. *See Snapnames.com, Inc.*, 2006 WL 3491005 at *6. Had DOL felt the job requirements were

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[2] However, this would be incorrect, as the evidentiary requirements for an advanced degree professional or an alien of exceptional ability are set forth in the regulation at 8 C.F.R. § 204.5, which provides in pertinent part:

> (3) *Initial evidence.* The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.
> (i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:
> (A) An official academic record showing that the alien has a United States *advanced degree or a foreign equivalent degree*; or
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive postbaccalaureate experience in the specialty.

actually less than those specified on the Form ETA 750, it could have required the petitioner to amend those requirements.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that Form ETA 750 be read as a whole. The instructions for item 14 of Form ETA 750A provide:

> **Minimum Education, Training, and Experience Required to Perform the Job Duties.** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education (number of years)

Grade school	6
High school	6
College	6
College Degree Required	Master Degree
Major Field of Study	Computer Science

Experience:

Job Offered	5 (yrs.)
Related Occupation	0

Block 15:

Other Special Requirements	(none stated)

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany,* 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith,* 595 F.

Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form]. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The record includes the beneficiary's Master's degree in Statistics and the curriculum for that degree. The curriculum includes a single computer science course. The petitioner, on appeal, submits an evaluation of the beneficiary's education and experience. The evaluation, from [redacted] concludes that the beneficiary's education alone is equivalent to a Master's degree in Statistics and that the beneficiary's subsequent years of experience are equivalent to a Master of Science degree in Computer Information Systems.

Also on appeal, the petitioner submits a December 14, 2006 Notice of Findings from DOL. The notice provides:

> The ETA 750, Part A indicates that employer is requiring a Master's Degree in Computer Science and five (5) years of experience in the job offered. A review of the ETA 750, Part B, reveals that the alien does not possess a Master's Degree in Computer Science.

The notice explains that the petitioner could rebut those findings by demonstrating that the beneficiary had the necessary education at the time of hire or deleting that requirement. In response, the petitioner noted that the beneficiary took a computer science course and other math classes and completed a diploma course in computer software. DOL ultimately certified the Form ETA 750 without deleting the Master's degree requirement.

Whatever correspondence may have taken place between the petitioner and DOL, it remains that DOL ultimately certified a plainly worded Form ETA 750 with a job requirement for a Master's degree in Computer Science. The form does not suggest that an equivalency based on education and experience or a degree in a related field would be acceptable. As stated above, USCIS makes a *de novo* determination as to whether the alien is qualified for the job based on the job requirements certified by DOL. *Tongatapu,* 736 F.2d at 1309. Thus, the petitioner has not entirely overcome the director's basis for denial.

Nevertheless, given the clear evidence of DOL's inquiry into the sole issue raised by the director, and DOL's apparent acceptance of the petitioner's explanation, we find that there are additional issues that form a stronger basis of ineligibility.

Specifically, the petitioner expressly required six years of college level education. DOL referenced only the Form ETA 750 in questioning the concentration of the beneficiary's degree. DOL did not inquire as to the number of years of college completed by the beneficiary.

The evaluation submitted on appeal indicates that the beneficiary completed a three-year baccalaureate and a two-year Master's degree program. Thus, the beneficiary only completed five years of post-secondary education. We acknowledge that evaluation from [redacted] concluding that the beneficiary has the equivalent of a U.S. Master's degree in Statistics. [redacted] lists four references in support of his conclusion but does not provide copies of the relevant pages from these references that support his conclusion.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petitioner is not presumptive evidence of eligibility; USCIS may evaluate that content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id* at 795; *see also Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah,* 17 I&N Dec. 244 (Reg'l Comm'r. 1977). In considering whether the beneficiary's three-year degree plus a two-year Master's degree can be considered equivalent to a U.S. Master's degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). ACCRAO, according to its website, www.accrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://accraoedge.accrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials." Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at *www. Aacrao.org/publications/guide to creating international publications.pdf.* If placement recommendations are included, the Council Liaison works with the

author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.[3]

In the section related to the Indian educational system, EDGE provides that a two-year Master's degree following a three-year bachelor's degree "represents the attainment of a level of education comparable to a bachelor's degree in the United States." This information is not consistent with the evaluation submitted.

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In addition and as noted above, we note that the beneficiary claimed on the Form ETA 750B to have worked for the petitioner since 2002. While the petitioner lists a Texas address, the address where the beneficiary would work is listed as the beneficiary's home address in California. According to the information submitted on appeal, DOL inquired as to where the beneficiary has been working and would work. In response, the petitioner asserted that the Texas office was merely rented for administrative work and that employees work at client locations or "from their home." DOL certified the Form ETA 750, amending the location to the petitioner's location in Texas. The petitioner listed the same information on Part 6 of the Form I-140 petition.

The beneficiary, however, remains in California. Significantly, while a review of the Texas website confirms that the petitioner's status is active,[4] the California website lists the petitioner's status in California as "surrender." Thus the record is not clear that the job certified by DOL is still open and available to the beneficiary.[5] *See* Part A of ETA 750 for position certified.

Further as set forth on the Form ETA 750A, the certified position requires that the beneficiary must possess five years of experience in the job offered as a senior software engineer obtained as of the priority date of April 19, 2004. No alternate occupational experience is acceptable. Employment verification letters contained in the record indicate that he has experience as a programmer, senior programmer, programmer analyst, team member and/or project leader, and senior analyst, but the record is not clear that he obtained five full-time years of employment experience as a senior software engineer as of the priority date.

Finally, we note that on June 6, 2007, the petitioner filed a nonimmigrant visa petition on behalf of the beneficiary, receipt number EAC 07 176 53538. On December 26, 2007, the petitioner

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[3] Accessed 1/22/10.
[4] http://ecpa.cpa.state.tx.us/coa/servlet/cpa.app.coa.CoaSearch. Accessed 1/22/10.
[5] http://kepler.sos.ca.gov/cbs.aspx. Accessed 1/22/10.

withdrew the petition. The director may wish to review that record of proceeding and consider whether the information in that record bears on whether the petitioner still intends to employ the beneficiary in any capacity.

Based on the foregoing, this matter will be remanded to the director. The director must inquire into whether the beneficiary has the necessary six years of college education and the requisite level of education as well as whether the beneficiary obtained the requisite five years of employment experience as a senior software engineer as of the priority date. The director must also determine whether the petitioner is still offering the same position certified by DOL. In the event that the director concludes, after the above inquiries, that the petition is not approvable, the director shall issue a new denial notice, containing specific findings that will afford the petitioner the opportunity to present a meaningful appeal. The burden of proof remains solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above. The petition is remanded to the director for issuance of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.